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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JULIO ANTONIO CANO, Defendant and Appellant.	B201026 (Los Angeles County Super. Ct. No. VA096547)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret Miller Bernal, Judge. Affirmed as modified.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a negotiated agreement Julio Antonio Cano pleaded no contest to one count of first degree robbery and admitted various sentencing enhancements, including that he had suffered one prior serious or violent felony conviction. Cano was sentenced to an aggregate state prison term of 23 years. Prior to entering the plea, Cano's retained counsel's request for a continuance of the trial was denied. On appeal Cano argues the trial court abused its discretion in denying the defense motion for a continuance, he was denied the effective assistance of counsel because his attorney failed to adequately state the grounds for a continuance and was unprepared for trial, and the court further abused its discretion when it refused to allow him to withdraw his plea based on his showing of ineffective assistance of counsel. We modify the judgment to include one additional day of presentence custody credit and, as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges and the Evidence at the Preliminary Hearing*

In an information filed on October 31, 2006 Cano was charged with kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)) (count 1), first degree residential burglary (Pen. Code, §§ 459, 462, subd. (a)) (count 2), first degree residential robbery (Pen. Code, § 211) (count 3), making a criminal threat (Pen. Code, § 422) (count 4), unlawful possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) (count 5) and unlawful possession of ammunition (Pen. Code, § 12316, subd. (b)(1)) (count 6). The information specially alleged as to counts 1 and 3 that Cano had personally used a firearm in committing the offenses (Pen. Code, § 12022.5). It was also specially alleged as to counts 1 through 4 that each offense was a serious or violent felony and that Cano had suffered two prior convictions for serious or violent felonies within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and one prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a). Cano pleaded not guilty and denied the special allegations.

Cano was represented at the preliminary hearing, held on October 17, 2006, by his retained counsel, Richard E. Nahigian. City of Bell Police Officer Rolando Carranza testified at the hearing he responded to a call from a motel sometime after 8:00 p.m. on

July 30, 2006. At the motel Carranza spoke with Henry Adams, who told him he had gone to his room about 3:00 p.m. that day and had seen Cano and Adams's friend Nanette inside the room getting high. Adams was upset because Cano was flirting with Nanette; Adams asked Cano to leave. That evening Adams went to the motel parking lot, where Cano came up to him, pointed a handgun (a .357 magnum) at his head and threatened to kill him. Cano ordered Adams to go back inside the motel room with him.

Once inside the motel room, Adams was ordered to remove his clothes. Nanette took between $140 and $200 from Adams's jeans pocket and gave it to Cano. Cano then directed Adams to give him a package of heroin Adams had secreted in his rectum. (Adams told Carranza only Nanette knew he had hidden the heroin on his body.) Cano then told Adams to leave before Cano killed him. Adams left the motel room naked.

City of Bell Police Detective Terry Dixon testified Cano was arrested early the next morning, July 31, 2006, following a foot pursuit by police officers. The pursuit had ended when Cano barricaded himself in the restroom of a restaurant. He was removed from the restroom after a SWAT team fired tear gas into the building. A loaded .357 magnum was found in the restroom, and five additional rounds of ammunition were found in Cano's pocket. Shortly after Cano's arrest, Adams identified him in a photographic lineup. Dixon also interviewed Adams, who described Cano's conduct on July 30, 2006 in essentially the same terms as he had to Officer Carranza.

2. *Pretrial Proceedings and the Defense Request for a Continuance*

Cano, represented by Nahigian, was arraigned on the information on October 31, 2006. A pretrial conference was scheduled for November 28, 2006, and trial for December 27, 2006 (as day 57 of 60). On November 28, 2006 the pretrial conference was continued to December 18, 2006; the trial date remained December 27, 2006. On December 18, 2006, on Nahigian's motion, the court continued the pretrial conference to December 22, 2006 and rescheduled the trial for January 24, 2007 (as day 0 of 10). The pretrial conference was thereafter trailed by stipulation of counsel to January 9, 2007. On January 9, 2007, once again on Nahigian's motion, the pretrial was continued to January 19, 2007 and the trial was continued to January 26, 2007 (as day 0 of 10). On

January 26, 2007 Cano failed to appear with sufficient excuse (a "miss-out"). On Nahagian's motion the trial was trailed to February 2, 2007 as day 7 of 10.

On Friday, February 2, 2007, Nahagian appeared in court with Cano and requested another continuance of the trial date. Although not all of the discussion among Nahagian, Deputy District Attorney Brandon Wong and the court was reported, it is apparent Nahigian wanted additional time to attempt to negotiate a plea agreement and was frustrated by his inability to communicate with someone in the district attorney's office who was authorized to approve an agreement. Wong reported to the court, "Attempts at a settlement have been unsuccessful, but my assistant head deputy was unavailable. We are basically ready to proceed [to] trial." Wong indicated the defense had made a settlement offer of five to six years, which he stated was not close to being acceptable. The court agreed, characterizing it as "utterly unrealistic." Nahigian explained, "Without attempting to discuss settlement now, I did put in the brief I am open to any and all settlement discussions. I was hoping to settle the case. . . . And I also put in there that I hate the DA's style of poker on these things. It's the only area where they are not serious to case settlement." Because the victim, Henry Adams, was apparently present in the courtroom, Nahigian suggested, notwithstanding the seriousness of the charges, there were mitigating circumstances and stated, "I don't really want to go into it too far, but I would like the opportunity to discuss it. I've been precluded from doing that. He's been a miss-out twice and there's been no availability."

The court denied the request to continue the trial and said it would trail the case to the following Monday, February 5, 2007. Nahigian then stated, "I am not ready to go forward," but again explained he was interested in pursing a negotiated resolution of the case. "I want to explore all alternatives. It is a -- it's not right to the criminal justice system that if there's a possibility of a case being settled, that there having been no forum even for a conversation, that a week or two-weeks tying up the court's time -- I really would like this to be put over so we can make some reasonable efforts. . . . It's the type of case that should settle." The court responded the absence of substantive settlement

discussions, given that the arraignment "goes back to October of this last year," is not grounds for a continuance.

At this point Nahigian said, "I'm not ready for trial." The court asked, "Well, on what grounds?" Nahigian replied only, "I'm not prepared, your honor . . . . I'm not ready." The court responded, "That's not grounds for a continuance, counsel. You had time to be ready. If you're not ready because you've got witnesses under subpoena who are legally unavailable, that's grounds for a continuance. If you're engaged in another trial, that's ground for a continuance. . . . Simply saying that you're not ready doesn't happen."

3. *Cano's Plea and His Subsequent Request To Withdraw the Plea*

On Monday, February 5, 2007, Cano appeared with Nahigian, withdrew his not guilty plea and, pursuant to a negotiated agreement, pleaded no contest to one count of first degree robbery (count 3) and admitted he had personally used a firearm in committing the robbery and had suffered a prior serious felony conviction. Cano acknowledged he understood the charges against him, understood the maximum sentence he could receive was 27 years in state prison and confirmed he wanted to plead no contest to count 3 to take advantage of the terms of the plea offer. The court found Cano had knowingly and intelligently waived his constitutional and statutory rights and the plea of no contest was made freely and voluntarily and with an understanding of its nature and consequences. The court then sentenced Cano to an aggregate state prison term of 23 years: the middle term of four years for first degree robbery, doubled to eight years under the Three Strikes law, plus a 10-year firearm-use enhancement and a five-year prior serious felony conviction enhancement. Pursuant to the negotiated agreement, the remaining counts and special allegations were dismissed.

Several weeks later Cano retained new private counsel, James P. Cooper, who moved to withdraw Cano's no contest plea. Cooper argued Nahigian had not been prepared for trial (thus providing ineffective assistance to Cano) and Cano had been pressured into accepting the plea agreement by Nahigian's lack of preparation. The

People filed an opposition to the motion. The trial court heard argument and denied the motion.

Cano appealed from the judgment. His statement of reasonable grounds for issuance of a certificate of probable cause identified as issues for appeal ineffective assistance of counsel and the trial court's abuse of discretion in denying his motion to withdraw the no contest plea. The trial court issued a certificate of probable cause pursuant to Penal Code section 1237.5.

DISCUSSION

1. *Cano's No Contest Plea Waived Any Challenge to the Propriety of the Denial of His Counsel's Motion for a Continuance or the Effectiveness of His Counsel's Representation in Requesting the Continuance*

On appeal, although presented as several different legal issues, Cano in essence contends his retained counsel, Richard E. Nahigian, was not prepared to try his case on February 2, 2007 and, as a result, when the trial court denied Nahigian's request for a continuance, Cano was unfairly pressured into pleading no contest to the robbery charge and admitting several sentencing enhancements. To the extent Cano's arguments are premised on anything other than the validity of his plea itself, based on his counsel's purported constitutionally ineffective representation, those issues have been waived by Cano's no contest plea.

"[W]hen a defendant pleads guilty or no contest and is convicted without a trial, only limited issues are cognizable on appeal. A guilty plea admits every element of the charged offense and constitutes a conviction [citations], and consequently issues that concern the determination of guilt or innocence are not cognizable. [Citation.] Instead, appellate review is limited to issues that concern the 'jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.'" (*In re Chavez* (2003) 30 Cal.4th 643, 649; see *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178 ["issues going to the determination of guilt or innocence are not cognizable on appeal [following a guilty plea conviction]; review is instead limited to issues going to the

jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea"].)

In pursuing an appeal after a plea of guilty or no contest, a defendant is not limited to issues specified by the trial court in the certificate of probable cause or the statement of reasonable grounds for issuance of the certificate. (*People v. Hoffard, supra*, 10 Cal.4th at pp. 1178-1179.) However, an issue that is not otherwise cognizable on appeal after a guilty plea does not become appealable simply because it is identified in a certificate of probable cause. (See *In re Chavez, supra*, 30 Cal.4th at p. 650.)

Any error in the trial court's refusal to grant the defense request for a continuance prior to entry of Cano's no contest plea was waived by that plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8 ["the alleged error in the refusal to grant a continuance could not have been raised even if defendant had obtained a certificate of probable cause, because it was waived by the plea of guilty"]; *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786 [contention trial court erroneously denied motion for a continuance was waived by defendant's guilty plea].) The denial of a continuance motion prior to the plea does not go to the legality of the proceedings. (*Kaanehe*, at pp. 8-9.) Similarly, counsel's purported ineffectiveness in failing to adequately articulate the grounds for the requested continuance -- he simply said he was not prepared to go forward with a trial without explaining what more needed to be done or why the time he had worked on the case was insufficient[1] -- was waived by Cano's subsequent, conclusive admission of guilt. (*Ibid.*)

2. *The Trial Court Did Not Abuse Its Discretion in Denying Cano's Request To Withdraw His Plea Based on a Claim of Ineffective Assistance of Counsel*

Pursuant to Penal Code section 1018 a defendant may move prior to the entry of judgment to set aside a guilty (or no contest) plea for good cause. In his motion to withdraw his no contest plea, filed by Cano's new retained counsel, Cano asserted Nahigian had advised him he was not prepared to try the case and urged him to accept the plea agreement offered by the People solely to avoid going to trial. Cano insisted he had

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[1] A continuance of a criminal trial may be granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (e); *People v. Wilson* (2005) 36 Cal.4th 309, 352.)

agreed to the plea only because he felt pressured to do so. Cano now argues Nahigian rendered ineffective assistance of counsel by failing to investigate and prepare for trial and, as a result, effectively coerced Cano into making an uninformed and involuntary decision to enter a no contest plea.

Cano is certainly correct that a criminal defendant is entitled to the effective assistance of counsel in negotiating and entering a guilty plea: "The pleading -- and plea bargaining -- stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) Accordingly, ineffective assistance of counsel may constitute good cause for withdrawal of a guilty plea. (*Id*. at p. 934 ["where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea"].) However, to "successfully challenge a guilty plea on the ground of ineffective assistance of counsel, a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*Ibid.*; see generally *People v. Williams* (1997) 16 Cal.4th 153, 215 [to prevail on a claim of ineffective assistance of counsel, appellant must establish his or her counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different].)

Here, other than Cano's own after-the-fact, self-serving statement he would not have accepted the negotiated agreement if Nahigian had not said he was not ready for trial, there is no evidence Cano wanted to try the case or would have rejected the plea offer if Nahigian had been better prepared. The Supreme Court has repeatedly held such a statement, standing alone, is insufficient to establish prejudice and "must be corroborated independently by objective evidence." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938; accord, *In re Resendiz* (2001) 25 Cal.4th 230, 253.) On this record, there is no

dispute Nahigian accurately communicated the plea offer to Cano[2] and Cano was amenable to negotiating a plea bargain. (See *In re Resendiz*, at p. 253 [identifying these factors as among those to be considered in determine whether a defendant, with effective assistance, would have accepted or rejected a plea offer].) Indeed, at the hearing on the motion to withdraw his plea, Cano's new counsel clarified he was not contending Cano was tricked into the plea agreement; he fully understood what he was doing. Moreover, as described above, the defense request for a continuance on February 2, 2007 was expressly grounded on Nahigian's desire to have more time to pursue a negotiated plea deal; it was only when the court denied that request that Nahigian asserted, in conclusory fashion, he was not prepared to try the case.

Based on the numerous serious charges pending against him, together with the special allegations he had two prior strike convictions, had suffered a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a), and had personally used a firearm in committing several of the felonies, Cano faced multiple 30-years-to-life sentences if convicted after a trial. Cano and Nahigian knew the victim, Henry Adams, was in court and prepared to testify and, based on testimony from the preliminary hearing, had previously told consistent versions of the events in separate interviews with different police officers. In view of the disparity between the terms of the plea agreement and the probable consequences of going to trial,[3] Cano's claim of feeling pressure from his counsel's purported lack of preparation could properly be viewed by the trial court as buyer's remorse. (See *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208 ["'A plea may not be withdrawn simply because the defendant has changed his mind.' [Citations.] [¶] . . . [¶] Hurick's claim that his family pressured him into the plea is not enough to constitute duress. Nothing in the record indicates he was under any

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[2] In his declaration in support of the motion to withdraw his plea, Cano stated Nahigian said the prosecutor had offered a plea bargain requiring that he serve 23 years.

[3] The written plea form signed by Cano acknowledged he had had a full opportunity to discuss with his attorney the facts of his case, the elements of the charged offense and enhancements and any defenses he might have.

more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain."].)

In addition, Cano's motion to withdraw his plea, evaluated in the context of the court proceedings leading to the entry of his plea, failed to provide a sufficient basis for the trial court to conclude Nahigian's representation of Cano was deficient. After failing to persuade the trial court to continue the trial to permit additional settlement negotiations, Nahigian asserted he was not prepared to proceed to trial. However, when given an opportunity by the trial court to elaborate, Nahigian did not disclose the extent of his trial preparation or detail what additional investigation or research he believed was necessary.[4] To be sure, Cano's declaration in support of the motion to withdraw his plea described only limited contact between lawyer and client; and Cano's new counsel asserted the file he received from Nahigian had only a few pages of notes. But Cano's declaration omits entirely the fact that Nahigian represented him at his preliminary hearing; and neither Cano's declaration nor the argument of his new counsel identifies any significant facts relating to the charges or potential defenses that were unknown to Nahigian or would have had any effect on an evaluation of the desirability of the plea agreement being offered. (See *People v. Weaver* (2004) 118 Cal.App.4th 131, 146 ["'[t]he burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty'"].)

Because Cano failed to demonstrate he received ineffective assistance of counsel or any other good cause existed for the withdrawal of his plea, the court did not abuse its discretion in denying the motion to withdraw the no contest plea. (See *In re Brown*

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[4] The appellate record does not indicate Nahigian was ever specifically asked about the level of his preparation or what additional preparation, if any, he believed was necessary to be able to go to trial. "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

(1973) 9 Cal.3d 679, 685, disapproved on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098, fn. 7 [“‘the withdrawal of such a plea rests in the sound discretion of the trial court and a denial will not be disturbed unless the trial court has abused its discretion’”]; *People v. Weaver, supra,* 118 Cal.App.4th at p. 146 [“‘[w]hen a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result’”]; *People v. Huricks, supra,* 32 Cal.App.4th at p. 1208 [“‘[w]ithdrawal of a guilty plea is left to the sound discretion of the trial court’”].)

3. *Cano Is Entitled to One Additional Day of Presentence Custody Credit*

Cano was awarded 348 days of presentence custody credit: 303 actual days and 45 days of conduct credit (15 percent of the actual days served, as limited for violent felonies by Penal Code section 2933.1). Cano was arrested on July 31, 2006 and was sentenced on May 30, 2007 -- a span of 304 days when, as required, both the day of arrest and the day of sentencing are included. (See *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Fugate* (1990) 219 Cal.App.3d 1408, 1414.) Cano requests this court order the abstract of judgment corrected to reflect credit for the one additional day in custody he actually served prior to sentencing.

The Attorney General agrees, “assuming that he remained in custody for the entire period,” Cano was in custody for 304 days at the time of his sentencing. However, the Attorney General argues it cannot be conclusively determined from the record on appeal whether Cano was released on bail at some point between July 31, 2006 and May 30, 2007 and also suggests Cano’s custody during that period may have been attributable to the summary revocation of his probation in connection with a prior criminal conviction (case No. NA066457). (As part of his plea agreement in this case, the court found Cano in violation of probation in case No. NA066457, a prior, unrelated matter; at sentencing the court revoked, reinstated and terminated probation.) The Attorney General also notes the 303-day figure for actual custody credit was proposed by Cano’s counsel without explanation. In light of these uncertainties the Attorney General argues Cano’s claim should have been presented to the trial court in the first instance. (See *People v. Mendez,*

supra, 19 Cal.4th at pp. 1100-1101 [suggesting Court of Appeal need not resolve issue of miscalculation of presentence custody credit that was not raised in the trial court even if issue is properly presented with other issues].)

The Attorney General's first argument -- that Cano is entitled to 303 days of actual custody credit but not 304 days because he may have been released on bail one day and remanded to custody the next -- borders on the frivolous. Cano's bail in this matter was set at $7.6 million. The probation and sentencing report filed with the court on March 23, 2007 -- six weeks after the entry of his plea -- indicates at the time of his arrest Cano was unemployed and had no personal assets. He had previously been employed as a car salesman, earning approximately $2,000 per month. His release on bail is thus highly improbable (to say the least); and the suggestion he was released for a single day unimaginable. In addition, the probation report, which was "typed: 2-15-07," reflects 202 "estimated days in jail in this case" -- a number that is inconsistent with any bail release time. Moreover, the minute orders for each of Cano's court appearances indicate he was remanded at the conclusion of the hearing, again supporting the conclusion he was in custody throughout the entire pretrial period.

The Attorney General's second argument -- that Cano may not be entitled to presentence custody credit because his local custody time could be attributable, at least in part, to probation revocation proceedings in case No. NA066457 -- misapprehends the "multiple restraint" rule articulated by the Supreme Court in *People v. Bruner* (1995) 9 Cal.4th 1178, an issue this court explored at some length last year in *People v. Pruitt* (2008) 161 Cal.App.4th 637. The *Bruner* Court held a defendant in custody for both new criminal charges and violating the terms of his or her probation (a multiple restraint situation) cannot obtain credit for confinement prior to sentence "if he cannot prove the conduct which led to the sentence was a dispositive, or 'but for,' cause of the presentence custody." (*Bruner*, at p. 1180.) Because Bruner's parole revocation was predicated only in part on the same conduct as the new criminal charges, he was not entitled to duplicative custody credit for the criminal and revocation terms. (*Id.* at pp. 1182-1183.) However, approving the decision of the Court of Appeal in *People v. Williams* (1992) 10

Cal.App.4th 827, the *Bruner* Court recognized a defendant was entitled to credit against his sentence for time spent in custody on a probation revocation if this custody arose from the identical conduct that led to the criminal sentence on the new offense. (*Bruner*, at p. 1193, fn. 10; see *Pruitt*, at pp. 646, 648-649.) That is precisely the situation here. Cano was in custody commencing July 31, 2006 based on the allegations he had committed a kidnapping to commit robbery, burglary and residential robbery (all with Adams as victim). His probation revocation was based on the identical conduct. Thus, his multiple restraint on new charges and for violating probation does not disentitle him to full presentence custody credit for the time he spent in local custody prior to sentencing on May 30, 2007.

In sum, the record before us is adequate to conclude Cano is entitled to 304 days, not 303 days, of actual custody credit and to 45 days of conduct credit. Accordingly, we modify the judgment to reflect a total of 349 days of presentence custody credit. (See *People v. Jones* (2000) 82 Cal.App.4th 485, 493 [although generally under Pen. Code, § 1237.1 a defendant must first present a claim regarding presentence custody credits to the trial court, if there are other issues to be decided on appeal, the appellate court may simply resolve the custody credit issue in the interests of economy]; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427 ["section 1237.1, when properly construed, does not require defense counsel to file motion to correct a presentence award of credits in order to raise that question on appeal when other issues are litigated on appeal"].)

DISPOSITION

The judgment is modified to award Cano 349 days of presentence custody credit, 304 actual days and 45 days of conduct credit. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

ZELON J.

JACKSON, J.